



# **The California Racial Justice Act (AB 2542)**

***An Introduction  
and Survival Guide***



**Chris  
Bouffard  
Sr. DDA**



## ***What is AB 2542?***

- ① “We **cannot simply accept** the stark reality that race pervades our system of justice.”
- ② “Discrimination undermines **public confidence** in the fairness of the state’s system of justice and deprives Californians of equal justice under law.”
- ③ “[A]ll persons possess **implicit biases** ..., that these biases impact the criminal justice system ..., and that negative implicit biases tend to disfavor people of color.”
- ④ “The intent of the Legislature is not to punish this type of bias, but rather to **remedy the harm** to the defendant’s case and to the integrity of the judicial system.”





# Everyone Failed

## ► Prosecutors

***Duncan v. Ornoski* (9th Cir. 2001)  
286 Fed. Appx. 361**

**... animal imagery**

## ► Defense Attorneys

***Mayfield v. Woodford* (9th Cir. 2001)  
270 F.3d 915**

**... blatant racist**

## ► Judges

***McCleskey v. Kemp* (1987)  
481 U.S. 279**

**... disparities are inevitable**



## **Application**

▶ *New Penal Code section 745.*

▶ **Applies prospectively in cases in which judgment has not been entered prior to January 1, 2021.** (§ 745(j).)



A grant of probation is generally not considered a “judgment.”

▶ Applies to juvenile cases. (§ 745(f).)

▶ Includes post-conviction mechanisms. (§ 1473(f), § 1473.7(a)(3).)

▶ Provides a discovery mechanism. (§ 745(d).)

▶ **Violations can occur outside the courtroom, within the courtroom during the prosecution, and at sentencing.**

# CORE VIOLATIONS

(excluding charging and sentencing)

► Penal Code § 745

(a) The state shall not **seek or obtain a criminal conviction** ... on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

(1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.

**ANY TIME?  
ANY PLACE**

(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful.

**IN TRIAL  
IN COURT**

► Violations have nothing to do with “actual prejudice” or “harmless error.”

# VIOLATION (1)

(1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.

**ANY TIME?**  
**ANY PLACE**

## HYPOTHETICALS

### (out of court)

Prosecutor makes a derogatory social media post about defendant and his race during the case.

Prosecutor makes a derogatory social media post about defendant's race during the case.

Juror makes a derogatory social media post about defendant and his race after the case.

Judge makes a derogatory social media post about defendant's race during the trial.

Mark Fuhrman made derogatory remarks about OJ Simpson's race in 1985.

- ▶ What does "exhibit" mean?
- ▶ Violations can fall completely outside of your control!

# VIOLATION (2)

(a)(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used **racially discriminatory language** about the defendant's race, ethnicity, or national origin ... **whether or not purposeful.**

(h)(3) "**Racially discriminatory language**" means language that, to an objective observer, explicitly or **implicitly** appeals to racial bias, including but not limited to, **racially charged or racially coded language**, language that compares the defendant to an **animal, or language that references the defendant's personal appearance, culture, ethnicity, or national origin.** Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory."

# HYPOTHETICALS

## (language during trial)

Prosecutor refers to the defendant as an insect that flees upon the first sight of light.

Prosecutor refers to the defendant's *conduct* as being insect-like.

Prosecutor goes out of his way to make reference to the name of defendant's gang, which implies a racial epithet.

Prosecutor refers to defendant's community as a "different world" that "lives by a different code" than what jurors might be familiar.

Prosecutor refers to the defendant being a BMA, where identity is not an issue.

## **VIOLATION (2)**

(a)(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used **racially discriminatory language** about the defendant's race, ethnicity, or national origin ... whether or not purposeful.

## **“EXCEPTIONS”**

(a)(2) This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

(g) This section shall not prevent the prosecution of hate crimes pursuant to Sections 422.6 to 422.865, inclusive.

## **BEST PRACTICES?**

- ▶ Err towards retaining your bar card.
- ▶ Witnesses might need to be prepped.
- ▶ Some scenarios might benefit from a pre-trial motion.



# VIOLATION (2) JURY PEREMPTORIES

## ► If AB 3070 had *not* become law:

(a)(3) Race, ethnicity, or national origin was a factor in the exercise of peremptory challenges. The defendant need not show that purposeful discrimination occurred in the exercise of peremptory challenges to demonstrate a violation of subdivision (a).

(e)(A) [Potential Remedy:] Reseat a juror removed by use of a peremptory challenge.

(e)(C) [Potential Remedy:] Discharge the jury panel and empanel a new jury.

(But AB 3070 did become law.)

## ► The law as it stands:

(a)(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, ... **exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful.**

(e)(C) [Potential Remedy:] Discharge the jury panel and empanel a new jury.

► Will a “violation” of AB 3070 constitute a violation of AB 2542?



# STATUTORY REMEDIES

(e) Notwithstanding any other law ... if the court finds, by a preponderance of the evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list:

(1) **Before a judgment has been entered**, the court may impose any of the following remedies:

(A) Declare a **mistrial**, if requested by defendant.

(B) Discharge the jury panel and **empanel a new jury**.

(C) If the court determines that it would be in the interest of justice, **dismiss enhancements**, special circumstances, or special allegations, or reduce one or more charges.

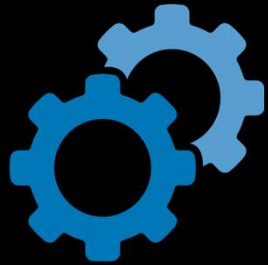
(2) [When a judgment has been entered ...]



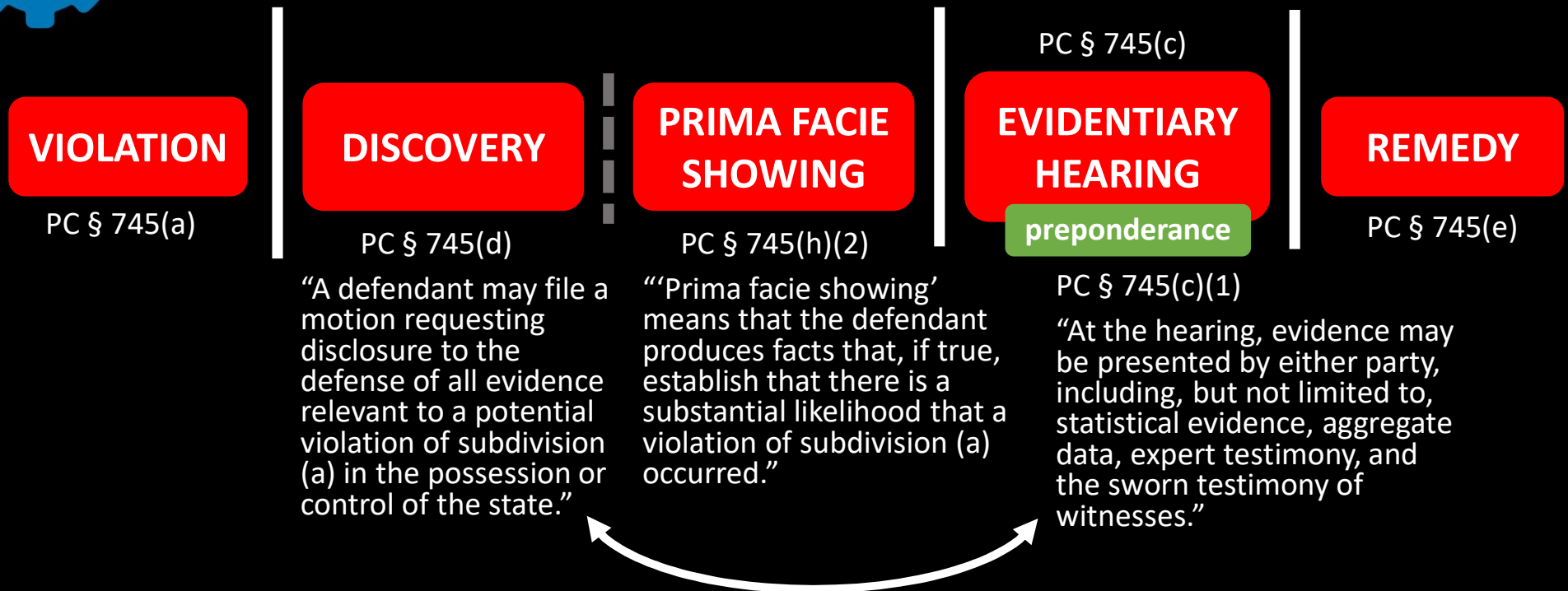
(3) **When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty.**

► With AB 3070 factored, DP jury selection may become chaotic.

(4) [Any other remedies available under law.]



# MOTION ANATOMY



► There is no predefined timeline. It could take 3 hours or 3 months.

# **VIOLATION (3)**

► Penal Code § 745

## **(charging and convicting)**

- (a) The state shall not **seek or obtain a criminal conviction** ... on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:
- (3) The defendant was **charged or convicted of a more serious offense** than defendants of other races, ethnicities, or national origins who commit **similar offenses** and are **similarly situated**,  
[\*]and[\*]  
the evidence establishes that the prosecution **more frequently sought or obtained convictions** for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the **county** where the convictions were sought or obtained.
- (h)(1) "**More frequently sought or obtained**" ... means that statistical evidence or aggregate data demonstrate a **significant difference** in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed **similar offenses** and are **similarly situated**, and the prosecution cannot establish race-neutral reasons for the disparity.

# **VIOLATION (4)** ► Penal Code § 745 (sentencing)

- (a) The state shall not ... **seek, obtain, or impose a sentence** on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:
- (4) (A) A **longer or more severe sentence was imposed** on the defendant than was imposed on other **similarly situated** individuals convicted of the **same offense**, **and** longer or more severe sentences were **more frequently imposed** for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the **county** where the sentence was imposed.
- (B) A **longer or more severe sentence was imposed** on the defendant than was imposed on other **similarly situated** individuals convicted of the **same offense**, **and** longer or more severe sentences were **more frequently imposed** for that **same offense** on defendants in cases with **victims** of one race, ethnicity, or national origin than in cases with **victims** of other races, ethnicities, or national origins, in the **county** where the sentence was imposed.
- (h)(1) "[**M**]ore frequently imposed" ... means that statistical evidence or aggregate data demonstrate a **significant difference** in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed **similar offenses** and are **similarly situated**, and the prosecution cannot establish race-neutral reasons for the disparity.





## DEFENDANT'S "STANDING"

***The violation must connect to a defendant's race, ethnicity, or national origin.***

PC § 745(i) - A defendant may share a race, ethnicity, or national origin with more than one group.

"Race" has no scientific definition. Geneticists have abandoned the idea of "race" generations ago.

If you were to say you're of the "American race" or the "Mexican race" that obviously sounds nonsensical. One's sense of belonging is often based more on a sense of national origin ("where you came from") or ethnicity ("shared history or customs").

At what point is Identity an Appropriation?

### CMS: "RACE"

*I-American Indian or Alaska Native*

*O-Some Other Race*

*U-Unknown/Refuse to State*

*B-Black/African American*

*W-White/Caucasian*

*H-Hispanic*

*A-Asian*

*MR-Multiple Races*

*PI-Native Hawaiian or Other Pacific Islander*



# **The California Racial Justice Act (AB 2542)**

***An Introduction  
and Survival Guide***



**Chris  
Bouffard  
Sr. DDA**